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Supreme Court, U.S.
FILED
APR 19 1999
CLERK

No. 98-1469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

IN RE ROBERT B. BIECK, JR.,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

A. Introduction.

In a case that will become legendary for the judicial havoc it will cause if not addressed by this Court, *five* separate petitions for writ of certiorari now have been filed.[1] The fifth was filed by the district judge, Honorable Nauman S. Scott of the Western District of Louisiana, and is the reason for filing this supplemental brief pursuant to Rule 15.8.[2]

Judge Scott continues as an advocate in this case. He continues to be assisted and represented by counsel for the private plaintiff in the underlying RICO action. Notably, Judge Scott tells this Court that he is unsure of the due process requirements that were applicable to the proceedings in his court.

B. Judge Scott's Petition Confirms That The Rules For The Sanctions Trial Were *Ad Hoc* Rules, Not Due Process Protections.

The Fifth Circuit found that those who were sanctioned below with monetary fines were denied the fundamental due process right of a fair and impartial prosecutor. App. 23a.[3] Bieck argues for the same fundamental right before he is suspended from the practice of law in the federal courts. Bieck stated at page 20 of his original petition:

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1. Nos.: 98-1465 - Wright; 98-1468 - Berry; 98-1470 - Burns; 98-1469 - Bieck; 98-1498 - Scott, J.

2. There is no indication that the Solicitor General has joined in or authorized Judge Scott's petition. *See* 28 U.S.C. § 518(a); *United States v. Providence Journal Co.*, 485 U.S. 693 (1988).

3. "App." references are to the Appendix accompanying Bieck's original petition.

> Those sanction defendants who were tried under the show cause order, which exposed each of them to the same inherent powers of the district court to make the rules, adjudicate the violation, and decide upon the penalty, were all entitled to the same basic due process protections and fairness. To conclude otherwise is to approve of a trial without any basic protections in a court without rules. * * * *
>
> Mere afterthought designation of a case as "criminal," "quasi-criminal," or "civil" can not serve as a judicial standard for the institution and trial of attorney sanction proceedings.

Bieck's petition argues that the sanctions trial below violated established due process principles as laid down in *Chambers v. NASCO*, 501 U.S. 32 (1991); *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821(1994); *Young v. U.S. ex rel Viritton et Fils S.A.*, 481 U.S. 787 (1987); *In re Ruffalo*, 390 U.S. 544 (1968); and *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946).

Judge Scott's petition argues that, on the question of what due process protections should be afforded in this type of case, the Circuits are in conflict because this Court's *NASCO* decision left the issue unexplored. Scott, J., petition at pp. 12-13. Judge Scott also argues, "The only dispute is the due process required to impose sanctions in this case." *Id.* at p. 14. The Judge describes his "quandary" (*Id.* at p. 15) in this sanctions proceeding of not criminalizing the criticized conduct but at the same time protecting the integrity of his court. (*Id.* at p. 14). He argues that this predicament infects the entire district court system.

Implicit in Judge Scott's petition is his joinder in Bieck's premise that Bieck was denied due process protections in favor of a preference for *ad hoc* procedure and rules which the Judge thought necessary to protect the integrity of his court. Judge Scott concluded that he could, and therefore did, initiate a proceeding which resulted in (i) no fair and impartial prosecutor; (ii) extensive *ex parte* and secret

communications; and (iii) a private litigant's counsel simultaneously representing his private client and the district court, as well as testifying as the chief witness.

Judge Scott's prescriptions for the sanctions trial went far beyond those he employed as the sitting district judge in *NASCO*. Here, his rules were totally improvised. His statements to this Court that he was acting in circumstances unexplored by this Court in *NASCO* and with uncertainty as to the amount of due process required are convincing evidence of the due process deprivations which occurred in this case.

It must be emphasized that the Fifth Circuit rendered its opinion on the basis of its evaluation of the degrees of penalties imposed, a highly debatable basis for decision. The panel majority was sufficiently perplexed by this case's unusual circumstances that even in the light of its own result, it lamented,

> In resolving this case, we must simply remain content to retain the vague, "quasi-criminal" designation that our precedents have expressly chosen to place upon such [suspension] sanctions, and conduct our due process analysis on that basis.

(App. 27a - Brackets supplied).

Such a state of legal affairs should not stand. Whether Judge Scott is correct in arguing that there is no precedent for this case but there should be, or whether Bieck is correct in arguing that this Court's prior decisions provided the applicable due process principles which were violated, this Court's exercise of jurisdiction to remove and correct a dangerous precedent is sorely needed.

C. Judge Scott's Petition Also Underscores The Need For His Recusal If This Case Is Remanded To The District Court.

Judge Scott's advocate role is further evidenced by his writ petition. Stating that "[t]he factual findings of the district court were

undisputed," Scott, J., petition p. 7,[4] the Judge's petition proceeds to lay out certain key facts. However, these facts as set forth by the Judge have been contested at every stage. The Judge cites his own Reasons, not the Fifth Circuit opinion which adopts some, but not all of the Judge's Reasons.

For example, the Fifth Circuit wrote: (1) that Burnthorn faxed Berry a copy of her letter to CNA (App. 8a); (2) that on July 7, 1994, Tone told Berry and Wright not to raise the possibility of a CNA contribution (App. 10a); (3) that on July 27, 1994, Hart's attorney (Mixon) stated that the settlement would fall apart if CNA were revealed (App. 12a); and (4) that Bieck drafted the settlement agreement with the name "American Casualty Company" appearing once, along with several other insurers in a long section titled "Settling Defendants." (App. 12a).

In contrast, the Judge's petition argues from his own Reasons: (1) Burnthorn distributed CNA information "to all defense counsel" (Scott, J., petition at p. 8); (2) "Tone asked defense attorneys on numerous occasions not to disclose CNA's involvement" (*Id.*); (3) "The attorneys . . . agreed that disclosure would derail the settlement" (*Id.* at p. 10); and (4) "Bieck knew the whole scheme. . . . [H]e buried American Casualty's name behind an endless list . . . ." (*Id.* at p. 11, fn. 7).

These are not fine distinctions. They are material differences in the two courts' appreciation of the record. They are important matters to Bieck because he (1) did not receive distribution of a letter from Burnthorn; (2) was not asked by Tone not to disclose CNA's involvement; (3) did not agree or express that disclosure would derail the settlement; and (4) did not know of or suspect any scheme, and did not "bury" American Casualty's name.

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4. The petition cites 151 F.3d at 222 where the majority of the Panel below stated:

> The following chronology traces the activities of these attorneys in the months leading up to the trial. It is based upon the factual findings of the district court, which in all relevant respects are undisputed.

The Judge is arguing his own findings to this Court, not reciting undisputed facts. He is once again demonstrating, as he did in the Fifth Circuit, that he has a solidly formed bias against the sanctions defendants. Unlike the sanction defendants and the Fifth Circuit, the Judge still insists upon lumping the sanction defendants as "all defense counsel," "the defense attorneys," and "the attorneys" even though there was no identity or concert of actions. Indeed, the Fifth Circuit expressly rejected both grounds which Judge Scott relied upon to support his conspiracy and fraud theories as to all the sanction defendants with the exception of Berry. (App. 41a-44a).

The Judge's petition demonstrates that his recusal is mandated if this case is remanded.

CONCLUSION

This has been a proceeding marked by the absence of due process. Judge Scott's separate petition also demonstrates that, from the outset, he never intended there to be any distinctions drawn between the sanction defendants, consistently lumped together in his mind as perpetrators of a despicable scheme to defraud his court. Therefore, the Fifth Circuit was manifestly in error to apply an after-the-fact analysis of the penalties, subjectively determined below, in order to salvage this proceeding despite its unprecedented *ad hoc* procedure and the inconsistent results which the Fifth Circuit's flawed analysis has brought about. Such an analytical model is a dangerous precedent. The Court is urged to grant its writ, summarily reverse, and dismiss as to Bieck.

Finally, Judge Scott's petition illustrates the high degree of improper influence upon his thinking brought about by his extensive *ex parte* communications and appointment of private plaintiff's counsel to represent and testify to the court. At the very least, recusal is mandated if remand is allowed to stand.

Respectfully submitted,

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